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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

In re M.C., a Person Coming Under the
Juvenile Court Law.

H042751
(Santa Clara County
Super. Ct. No. JD19298)

SANTA CLARA COUNTY
DEPARTMENT OF FAMILY AND
CHILDREN'S SERVICES,

Plaintiff and Respondent,

v.

J.C.,

Defendant and Appellant.

I. INTRODUCTION

In this juvenile dependency matter regarding M.C. (the child), the juvenile court terminated parental rights and selected adoption as the permanent plan pursuant to Welfare and Institutions Code section 366.26.¹ On appeal, J.C. (the father) contends the juvenile erred by terminating his parental rights after determining that the beneficial parent-child relationship exception did not apply. (See § 366.26, subd. (c)(1)(B)(i).) For reasons that we will explain, we will affirm the juvenile court's orders.

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

II. FACTUAL AND PROCEDURAL BACKGROUND²

A. *First Dependency Case*

On December 17, 2008, the Santa Clara County Department of Family and Children's Services (the Department) filed a third amended petition under section 300, subdivision (b) [failure to protect] alleging that the child, then two months old, came within the jurisdiction of the juvenile court. The child had been born in October 2008 and had been taken into protective custody 28 days later. The child had tested positive for marijuana at her birth, and she had shown symptoms of methadone withdrawal, necessitating treatment in the neonatal intensive care unit. The child needed regular therapy to prevent a long-term disability. The mother had tested positive for cocaine and marijuana seven times during her pregnancy and had been on methadone for nine years. The mother had criminal convictions for narcotics offenses as well as for vandalism, fighting, and other crimes. The father had been convicted of driving under the influence (DUI) twice and was on probation.

The father initially did not believe he was the child's biological father, and he claimed to have spent only one night with the mother. A paternity test subsequently showed that he was the child's father, and he requested custody of the child. The father did not believe he had an alcohol or drug problem. The social worker was concerned he lacked a "full understanding of the issues surrounding his DUI convictions."

On January 8, 2009, the juvenile court found the allegations of the petition true.

The Department filed a disposition report recommending the father receive reunification services. The father had participated in a family team meeting and had agreed to participate in 12-step meetings, drug testing, an alcohol and drug assessment, parent orientation, and parent education. The father had begun visiting with the child and

² Some of the background facts are taken from the record in the father's prior appeal (*In re M.C.*, dismissed Nov. 17, 2014, H041313), of which we have taken judicial notice. (See Evid. Code, §§ 452, 459.)

requested more visits. He needed instruction on how to care for a very young child. He did not consider himself an alcoholic but admitted having made “poor choices in the past.”

On January 29, 2009, the juvenile court adopted the Department’s recommendations, ordering a case plan that included the agreed-upon services as well as supervised visitation two times a week for two hours at a time. The social worker was given discretion to increase the frequency and duration of visits and to permit unsupervised visits.

In a status review report dated July 27, 2009, the Department recommended the child transition from foster care to the father’s home with family maintenance services. The father had completed parent orientation and a basic parenting class. He had been drug testing consistently, although one test showed possible trace amounts of alcohol. He had been attending 12-step meetings and had completed a drug and alcohol assessment. The father had been caring for the child, unsupervised, for several days at a time.

At the six-month review hearing held on August 24, 2009, the juvenile court adopted the Department’s recommendations, continuing the child in the Department’s care, custody, and control but approving her placement with the father.

In a status review report prepared for a hearing on February 22, 2010, the Department recommended the juvenile court dismiss the dependency. The child was living with the father and was “very bonded” with him. The father had been testing clean and attending 12-step meetings. The father had “created a safe and loving home” for the child, who was “thriving in his care.”

At the February 22, 2010 hearing, the juvenile court adopted the Department’s recommendations, terminating the dependency and ordering custody of the child to the father.

B. Second Dependency Case – Initial Proceedings

On January 3, 2013, the Department filed a new petition under section 300, subdivisions (b) [failure to protect] and (g) [no provision for support], alleging that the child, then four years old, again came within the jurisdiction of the juvenile court. The child had been placed into protective custody two days earlier, after the father was arrested for driving under the influence and child endangerment. The child had not been properly secured in her booster seat at the time of the incident. Additionally, a domestic violence restraining order had issued against the father, protecting R.H., who was his ex-fiancée and the child's former foster mother. The child had been present during at least one domestic violence incident.

On January 22, 2013, the Department filed a memorandum noting that the child had visited with the father twice. The juvenile court ordered the child to have visitation with the father while he was in custody “when appropriate and contact visits are allowed.” The juvenile court also ordered telephone contact “as arranged by [the] social worker and as available.” The father was ordered not to discuss the case with the child.

The Department's jurisdiction/disposition report recommended the father receive reunification services. The report contained additional details about the domestic violence leading to the restraining order. R.H. alleged that the father would become violent when he drank alcohol. He would hold her down, touch her inappropriately, and call her names—all in the child's presence.

The jurisdiction/disposition report also contained additional details about the father's recent arrest. The father had been involved in a traffic accident while driving with the child in the car. A responding officer smelled a strong odor of alcohol on the father's breath, the father's eyes were bloodshot and watery, and his speech was slurred. The father claimed he had not been drinking that day. The father agreed to take a preliminary alcohol screening test but only pretended to blow into the device. The child complained of pain in her head and was taken to the hospital. Right after the accident,

the father called R.H., who responded to the scene. The father continued to call R.H. during the next week, despite the restraining order.

The father and child had been visiting two times per week, and the visits had gone well. The father would bring home-cooked meals and the child's toys. The father would read and talk to the child during the visits.

In the jurisdiction/disposition report, the social worker expressed her concern that the father did not understand the impact alcohol had on him and the child, and that the father had not taken responsibility for his actions. The social worker recommended the father participate in parent orientation, parenting classes, a drug and alcohol assessment, 12-step meetings, drug testing, a treatment program, and a 52-week batterer's intervention program.

On March 4, 2013, the father waived his right to a hearing and submitted on the allegations of the petition. The juvenile court found the allegations of the petition true and adopted most of the Department's recommendations but ordered the father to participate in a 16-week "conflict and accountability program" instead of the 52-week batterer's intervention program. The juvenile court ordered supervised visitation, at least twice a week, for two hours at a time.

The Department filed a status review report dated August 28, 2013, in which it recommended the father continue receiving reunification services. The child was in a foster home where she appeared to be "happy and comfortable." The father had completed parent orientation. He had been attending 12-step meetings and the 16-week conflict and accountability program. He had been drug testing, with negative results, although one of his samples had been too dilute to ensure valid results. He had completed a drug assessment and outpatient drug treatment. The child's supervised visits with the father continued to go well. The social worker believed the father needed to not just attend the required programs but to understand about alcohol abuse and

healthy relationships. The social worker believed the father would benefit from individual counseling as well as a substance abuse parenting class.

In an addendum report, the social worker noted that a number of the father's relatives had offered placement for the child. One relative was the paternal aunt, who lived in Canada.

At the six-month review hearing held on October 9, 2013, the juvenile court adopted the Department's recommendations, ordering reunification services and a case plan that included counseling and a domestic violence assessment. The juvenile court increased supervised visitation to three times per week.

In an interim review report, the social worker noted that the paternal aunt was still interested in placement and had come to San Jose to visit with the child. The father was participating in therapy and a substance abuse parenting class. He still had pending criminal charges. The father was visiting with the child twice a week. The paternal uncle was supposed to be supervising the visits, but he had not been doing so. Instead, the child was visiting with both the father and R.H., with no supervision. The father admitted he had been having unsupervised visits without telling the social worker.

The father had completed a domestic violence assessment, which had found he was in the "Problem Risk Range" for truthfulness, the "High Risk Range" for alcohol, the "Medium Risk Range" for violence, and the "Low Risk Range" for control, drugs, and stress coping abilities. The father attributed the problems in his relationship to R.H.'s mental health struggles. The father denied being under the influence of alcohol at the time of his car accident.

On December 11, 2013, the juvenile court granted the Department's request to add a 52-week domestic violence class to the father's case plan.

The Department filed a 12-month status review report dated February 26, 2014, recommending the juvenile court terminate reunification services and set a selection and implementation hearing under section 366.26. The child remained in a foster home. The

father would soon be sentenced for his criminal charges and would likely serve six months to a year in jail.

There was ongoing domestic violence between the father and R.H. The father had gone to R.H.'s home on January 18, 2014 and banged on her window, yelled at her, and threw something at her window. The father had previously come to R.H.'s home and looked through her things, and he had sent her harassing text messages. The father had promised to let R.H. adopt the child.

The father had completed one session of the batterer's intervention program, and he had continued to drug test and attend 12-step meetings. He had attended individual counseling, but his therapist believed he had not yet "benefitted completely" from the process and that he was at risk of relapsing, so the therapist was recommending additional sessions.

The father's visits with the child continued to go well; they were supervised by Department staff. The social worker described the father and child as having a "warm and loving mutual relationship." However, the social worker did not believe that the father understood the "underlying issues" that had led to the child's removal nor the "depth and extent of the trauma" the child had experienced. The social worker described the father as having "complied on the surface" with his case plan "while continuing with his problematic behaviors, when he thinks they can be kept secret."

In an addendum report, the social worker reported on the child's "successful" visit with the paternal aunt in Canada. The child had enjoyed spending time with her aunt, uncle, and cousins, and she had indicated she would like their home to be her " 'forever' home." The paternal aunt was ready to provide the child with permanency but needed custody in order for the child to have Canadian residency so that she could access services.

The father supported the child's placement with the paternal aunt but did not want his reunification services to be terminated. He denied committing domestic violence and

maintained that “it was not a problem” when he had visited with the child without supervision by the paternal uncle.

On March 21, 2014, just before the 12-month review hearing, the father was terminated from his batterer’s intervention program. The father had attended three sessions and missed four sessions. His progress in most areas had been marginal.

At the 12-month review hearing, the father explained that he had not been able to attend more sessions of the batterer’s intervention program because he had gone into custody. The father had been serving a jail term since February 25, 2014. His projected release date was August 24, 2014, nearly two months after the 18-month review date of July 1, 2014. The father had informed a social worker that he did not want visits with the child while he was in custody. The father did not want the child to know he was going to jail. However, while in custody, the father had enrolled in the PACT program, which would make him eligible for visits with the child.

At the end of the 12-month review hearing on April 16, 2014, the juvenile court terminated the father’s reunification services and set the matter for a selection and implementation hearing. In rendering its ruling, the trial court referenced the father’s failure to change his thinking “in any significant way” with regard to substance abuse and domestic violence and the fact that he was “still in deep denial” of those problems. The trial court ordered the father’s supervised visitation to continue, including visits through the PACT program during the father’s incarceration.

On May 28, 2014, the Department filed a section 388 petition, requesting the child’s placement be changed from her foster home to the home of the paternal aunt in Canada. On June 9, 2014, the juvenile court granted the request.

C. First Section 366.26 Hearing and First Appeal

A selection and implementation hearing was held on June 16, 2014. In the Department’s section 366.26 report, filed that day, the social worker recommended the juvenile court order a legal guardianship, explaining, “[The child] needs to have

permanent legal status to be able to receive the benefits of Canadian residency, including public school and health care. Legal guardianship is the most rapid way to secure this for her.”

The child had worked with a therapist to address the issues of the father going to jail and her transition to living in Canada. In late February of 2014, just before serving his jail sentence, the father had told the child he would be going away, because he did not want her to know he was going to jail. He initially did not want visits with the child in jail, but he later changed his mind and applied for the PACT program, and the child had begun visiting with him in May of 2014. The child was not negatively impacted by not visiting with the father for that period of time, nor by visiting with him in jail. The father had been considered for an early release program, but jail staff had determined that it would not be appropriate. The father had continued to minimize the incident in which he was driving under the influence with the child.

The father submitted the matter on the Department’s report. The father’s attorney noted that the father was “glad” the child would be with his sister. The father anticipated being able to participate in a release program soon. The father noted that the paternal aunt was willing to bring the child to visit the father in the United States once a year and that the father was willing to go to Canada once a year; he requested the juvenile court make such orders.

The juvenile court ordered a legal guardianship without terminating the father’s parental rights. The juvenile court also ordered the father to have supervised visitation once a week for one and a half hours at a time until the child moved to Canada, and then supervised telephone calls. The juvenile court also made the visitation orders requested by the father.

The father filed a notice of appeal from the order establishing a legal guardianship for the child. This court dismissed the appeal as abandoned after appointed appellate counsel submitted a brief raising no issues and the father failed to submit a request to file

a supplemental brief on his own behalf. (See *In re Phoenix H.* (2009) 47 Cal.4th 835, 846.)

D. Second Section 366.26 Hearing and the Father's Section 388 Petition

On December 15, 2014, the date set for the permanency review hearing, the Department filed a status review report in which it requested a new section 366.26 hearing “for the purpose of changing . . . the permanent plan to adoption.” The paternal aunt had found that it was complicated to establish legal residency for the child in Canada without adoption. The child, who was six years old, was doing well in the home of the paternal aunt. She was having some “behavioral issues,” but the Canadian social worker believed the behaviors were “normal” in light of the adjustment. The child had weekly phone visits with the father. The calls went well and the child looked forward to them, although sometimes the child asked for the calls to end early.

In explaining why the juvenile court should order a permanent plan of adoption, the social worker explained, “[The child] will only have temporary residency until her adoption is finalized. Adoption is the best plan for [the child], as it will make her a permanent member of her aunt and uncle’s family, with the same status in the family as their biological children. It will also entitle her to all benefits of permanent Canadian residency. [The child] will also continue to have an ongoing supervised relationship with her birth father and other members of her birth parental family, as [the paternal aunt] maintains relationships with all family members.”

On April 7, 2015, the father filed a section 388 petition, requesting the juvenile court return the child to him on family maintenance services. The father explained that he had been released from custody since the prior order terminating his reunification services and that he had been engaging in services, including a child abuse treatment program and 12-step meetings. The juvenile court ordered a hearing on the father’s petition.

The Department filed opposition to the father's section 388 petition. The social worker opined that the child would be at "substantial risk if she returned to her father's care" because the father had not "demonstrated substantive change" regarding the dependency issues. The father had continued to minimize his alcohol use and the incident in which he had been driving while intoxicated with the child in the car.

On May 7, 2015, the Department filed a section 366.26 report. The social worker had recently visited the child in Canada. The social worker had learned that the child could not become a permanent resident until she had been freed for adoption. The child was still adjusting to living in the home of the paternal aunt. The child said she "missed her daddy" after acting out. The social worker believed that the child's behaviors would stabilize after she learned that the paternal aunt's home was "her permanent plan." The child had weekly supervised telephone visits with the father. The visits were "of a positive nature overall." The father sang and prayed with the child. The child enjoyed the visits but often asked to end the calls early.

The Department filed an addendum report in which the social worker reported on communication with the father's sponsor. The sponsor described the father's progress as "very slow," although the father had "come a long way." The sponsor felt that the father had put in "about 40-50% effort into his recovery." Meanwhile, the child's behavior had improved following the social worker's visit, during which the social worker had assured the child that the paternal aunt's home would be the child's "forever home."

In another addendum report, the social worker reported on the father's participation in the child abuse treatment program. According to a progress report, the father had completed 23 sessions. In all assessment areas he had received a score of three out of five, indicating he had "Minimum Application of New Skills; Demonstrates Understanding."

1. Hearing on the Father's Section 388 Petition

A contested hearing on the father's section 388 petition began on May 7, 2015. The father acknowledged he was an alcoholic in recovery. The father testified that while he was incarcerated, he had participated in daily eight-hour classes, during which he learned about alcoholism and its consequences and how to prevent relapses. He had continued taking the classes for seven weeks after his release. He had come to understand that his lack of patience and his emotions were his "two flaws," and he was applying strategies he had learned through his 12-step classes whenever he felt impatient or emotional.

The father testified that during his phone calls with the child, he talked with her about school and her behavior at the paternal aunt's home. They also talked about church and praying. Once, when the child said that she missed the father, he told her to "ask God for what she wants." Sometimes the child said she wanted to watch television or play. The father understood that he could not force the child to talk to him, so he would suggest they end the call early.

The social worker testified. She acknowledged that the child had expressed a desire to live with the father during telephone calls in January and February of 2015 and when the social worker visited her in Canada in March of 2015. The child had also expressed that she enjoyed living with the paternal aunt and her cousins, who she referred to as her family. The social worker did not believe that the child's statements about wanting to live with the father meant that it would be in her best interest to actually live with the father. She explained that the child did not "fully understand what it would mean to live with her father." The social worker described the paternal aunt as "very attuned" to the child and as occupying "a parental role" in the child's life. The social worker believed the child would suffer emotional harm if she were removed from the paternal aunt's home.

The social worker did not believe the father was in recovery. Although the father had completed programs and was able to articulate things he had learned in the programs, he had not explained how he had applied the lessons he had learned to his own life. The social worker opined that the father was at risk of relapse, which meant that the child would be at risk if she was returned to his care. The social worker believed the father was “putting his needs first,” referring to an incident in which the child had to ask the father three times to end a phone call early.

The father’s sponsor testified that the father was putting effort into his recovery and was committed to his recovery. The social worker misunderstood him when he described the father’s progress as “very slow.” The father had been “very responsible, very honest” and was “working hard” in the 12-step recovery program. He characterized the father’s progress as “very advanced.”

At the hearing, the father submitted a letter from the paternal aunt dated March 12, 2015. The paternal aunt described how the child often had tantrums, but also how the child sometimes played happily with her cousin. The paternal aunt indicated that she believed the tantrums were due to the child missing the father. The child told the paternal aunt that she missed the father and sometimes asked when she was going to go back to California to live with him. The child told her cousin that she thought she would get sent back to California if she misbehaved. The child was very attached to a stuffed rabbit and blanket that the father had given her, and she talked about food the father cooked and activities she did with the father.

On June 11, 2015, the juvenile court denied the father’s section 388 petition. The juvenile court found there were some changes in the father’s circumstances since the June 16, 2014 selection and implementation hearing, in that the father had been released from jail, completed the RCP program, and was attending a 52-week child abuse treatment program. However, the juvenile court found inconsistencies in the testimony of the father and his sponsor as to the father’s progress in his 12-step program. The juvenile

court found the sponsor was “not credible,” vague, and evasive. Other circumstances had not changed: the father continued to minimize his addiction, was unable to specify the consequences of his addiction, and did not commit to specific strategies for avoiding relapse. There was no evidence the father had been testing for drugs and alcohol recently, and the father had not completed a 52-week domestic violence program. Thus, the juvenile court found, the father was “by [and] large in the same place today” as a year earlier. The juvenile court further found that even assuming there was a change in circumstances, the father had not shown it would be in the child’s best interest to return her to the father’s care. The social worker’s testimony was “persuasive.” Returning the child to the father would not promote “permanence and stability,” which was the child’s “paramount need.”

On July 16, 2015, the juvenile court granted the father’s request that evidence introduced at the section 388 hearing be considered at the section 366.26 hearing.

2. Addendum Reports

Prior to the section 366.26 hearing, the Department filed another addendum report. The child’s behavior in the paternal aunt’s home continued to improve. The child remained “connected with her father” but referred to the paternal aunt as “mommy.” The paternal aunt indicated she planned to encourage visitation between the child and the father. Since the paternal aunt had a strong bond with the father, the social worker believed the paternal aunt would foster continued contact between the child and the father.

In a third addendum report, the social worker reported that the child’s behavior had “improved significantly” and that the child had begun referring to her cousins as her “ ‘brothers’ and ‘sister’.” The child was “ ‘connected and bonded’ to her aunt.” During phone calls with the father, the child enjoyed playing games but did not “engage with him further.” The child’s therapist believed that moving the child from her current caregivers and “stable home environment” would be traumatic for the child. The social worker

described the relationship between the child and the father as “not that of parent-child but rather like that of a favorite uncle,” noting that the child appeared to regard the father as “a dear playmate” and that the child did not look to the father “to emotionally support her with daily needs and circumstances.” The social worker acknowledged that the child enjoyed her relationship with the father and that the relationship had “some benefits” to the child. However, the child’s need for long-term stability was more important for the child’s well-being; another placement change would “not only disrupt her progress but likely result in her regressing and suffering long-term emotional harm.” Without adoption, the child was not eligible for state-funded health care, and the paternal aunt would not be able to pay for the child’s medical care.

In a fourth addendum report, the social worker reported on a visit between the father and the child in Detroit. The father was affectionate with the child and the child was responsive. The child referred to the father as “daddy.” However, when the child fell down and hurt herself, she went to the paternal aunt for comfort.

3. Section 366.26 Hearing

A contested section 366.26 hearing began on August 14, 2015.

The social worker testified that she had recently visited with the child in Canada for a second time. The child was happy in the paternal aunt’s home and sought out her cousins for play. The child would not suffer great harm if the father’s parental rights were terminated because she was “doing really well” in the home of the paternal aunt. Although the child had enjoyed spending time with the father during their visit in Detroit, the child had developed more of a parent-child relationship with the paternal aunt. The social worker did not believe that the child’s relationship with the father promoted her well-being to such a degree as to outweigh the benefits of adoption. The social worker did not believe that the paternal aunt would cut off visitation with the father even after his parental rights were terminated.

The social worker discussed the child's behavioral problems, which were being addressed in therapy. There was a "variety of reasons" for those problems, including the changes she had experienced in moving to Canada. The social worker acknowledged that the child "routinely" told the father she missed him, but the social worker did not believe the behavior problems were solely due to the child missing the father. The social worker believed that the child was "idealizing the situation" when she talked about wanting to live with the father. The social worker was also concerned that the child was reflecting what she believed the father wanted.

Xochitl Munoz, a social worker from Legal Advocates for Children and Youth, also testified. She had prepared a clinical assessment, which involved a home visit in Canada. When asked about her family, the child identified the paternal aunt, uncle, and cousins. She did not immediately identify the father as part of her family. Munoz observed the child look to the paternal aunt for reassurance and observed that the child had a sibling relationship with her youngest cousin. The child spoke about the father only briefly, sharing her memory of being in a car accident with him. The child expressed that she missed the father but then changed the subject and talked about wanting to jump on a trampoline.

Munoz agreed with the social worker from the Department that the child likely did not remember what it was like to have the father as her daily caregiver and that she "idealized" the relationship. She also agreed it would not be detrimental to the child to terminate the father's parental rights, because the child was "being stabilized" in the paternal aunt's home and because the paternal aunt had indicated she would facilitate communication and possibly visitation even after adoption. Munoz felt that adoption was in the child's best interest because it would provide her with stability, which she needed after "a very tumultuous past." Munoz also agreed with the other social worker's assessment that the child's behavior problems were "pretty typical" considering the

“trauma history” of the child, and that the behavior problems were not solely due to separation from the father.

The father testified that he had spoken with the child by phone once a week for an hour at a time, since the end of May. They talked about how the child was feeling and what was going on in her life. The child would ask when the father was going to come get her. The father would respond, “[C]lose your eyes, dear, and ask God for what your heart feels.” The child enjoyed talking about when she was a baby. The father felt that the child wanted to hug him, kiss him, and be with him.

The father talked about his visit with the child in Detroit. When the child saw him, she hugged him, kissed him, and said, “daddy, daddy, daddy.” They stayed up until 2:30 a.m. talking. The child asked him “are you coming for me,” but he deflected those questions by changing the subject. The father and the child spent two days together. When the child began to sense the visit ending, she became more attached to the father. The child was sad when the father said goodbye and said she wanted to go with him.

At the section 366.26 hearing, the child’s attorney joined in the Department’s request that the juvenile court terminate parental rights. Counsel for the father argued that the beneficial parent-child relationship exception to adoption applied. (§ 366.26, subd. (c)(1)(B)(i).) She argued that the father had maintained consistent and regular visitation despite the three or four months he spent in custody without seeing the child, and that the child would benefit from continuing the relationship with the father to such a degree that terminating parental rights would be detrimental to her.

At the end of the hearing, the juvenile court terminated parental rights. The juvenile court found that the beneficial parent-child relationship exception did not apply. First, the juvenile court found that the father had not maintained regular visitation and contact with the child, based on the time period in which he was incarcerated and did not have visits, at his own request. Second, the juvenile court found that even if the father had maintained regular visitation and contact, he had not met his burden to prove that he

had a parental relationship with the child or that the strength and nature of his bond with the child outweighed the benefits of adoption. The juvenile court noted that the child had been out of the father's custody for two and a half years, with mostly supervised visitation. The father was an important person in the child's life and the only person she identified as "daddy," and the juvenile court had "no doubt" the child would "suffer a certain degree of detriment" if she never saw the father again. However, the child's need for stability and permanence was "paramount," and the detriment from termination of parental rights would not be as great as the detriment the child would suffer if she was not adopted. The juvenile court found it "unlikely" the child would never see the father again after termination of parental rights, since the paternal aunt supported ongoing contact.

III. DISCUSSION

The father contends the juvenile court erred by terminating his parental rights at the section 366.26 hearing. He argues the juvenile court erred in determining that the beneficial parent-child relationship exception to adoption did not apply, because substantial evidence did not support the juvenile court's findings: (1) that he had not maintained regular visitation and contact, (2) that the child would not benefit from continuing the relationship, and (3) that the relationship was not a compelling reason for finding that termination of parental rights would be detrimental to the child.

A. Legal Background

The California Supreme Court has stated that "[t]he objective of the dependency scheme is to protect abused or neglected children and those at substantial risk thereof and to provide permanent, stable homes if those children cannot be returned home within a prescribed period of time. [Citations.]" (*In re Marilyn H.* (1993) 5 Cal.4th 295, 307.) "When the child is removed from the home, the court first attempts, for a specified period of time, to reunify the family. [Citation.]" (*In re Celine R.* (2003) 31 Cal.4th 45, 52

(*Celine R.*.) Where reunification efforts have failed, “ ‘the court must terminate reunification efforts and set the matter for a hearing pursuant to section 366.26 for the selection and implementation of a permanent plan. [Citation.]’ ” (*Ibid.*)

“The court has four choices at the permanency planning hearing. In order of preference the choices are: (1) terminate parental rights and order that the child be placed for adoption . . . ; (2) identify adoption as the permanent placement goal and require efforts to locate an appropriate adoptive family; (3) appoint a legal guardian; or (4) order long-term foster care. (§ 366.26, subd. (b).)” (*Celine R., supra*, 31 Cal.4th at p. 53.)

“When the juvenile court finds that the child is adoptable, it must terminate parental rights unless it finds one of four specified circumstances in which termination would be detrimental (§ 366.26, subd. (c)(1)(A)-(D)).” (*In re Brittany C.* (1999) 76 Cal.App.4th 847, 852.) “The specified statutory circumstances—actually, *exceptions* to the general rule that the court must choose adoption where possible—‘must be considered in view of the legislative preference for adoption when reunification efforts have failed.’ [Citation.]” (*Celine R., supra*, at p. 53.) “[I]t is only in an extraordinary case that preservation of the parent’s rights will prevail over the Legislature’s preference for adoptive placement.” (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350 (*Jasmine D.*.)

The parent/child relationship exception is set forth in section 366.26, subdivision (c)(1)(B)(i). Under that statutory provision, parental rights cannot be terminated where the juvenile court “finds a compelling reason for determining that termination would be detrimental to the child” because “[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” (§ 366.26, subd. (c)(1)(B)(i).)

B. Standard of Review

This court has determined that there is a two-part standard of review for a juvenile court's ruling regarding the application of the parent/child relationship exception. (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314-1315 (*Bailey J.*.)

First, “[s]ince the proponent of the exception bears the burden of producing evidence of the existence of a beneficial parental . . . relationship, which is a factual issue, the substantial evidence standard of review is the appropriate one to apply to this component of the juvenile court’s determination. Thus, . . . a challenge to a juvenile court’s finding that there is no beneficial relationship amounts to a contention that the ‘undisputed facts lead to only one conclusion.’ [Citation.] Unless the undisputed facts established the existence of a beneficial parental . . . relationship, a substantial evidence challenge to this component of the juvenile court’s determination cannot succeed.” (*Bailey J., supra*, 189 Cal.App.4th at p. 1314.)

“The other component of . . . the parental relationship exception . . . is the requirement that the juvenile court find that the existence of that relationship constitutes a ‘*compelling reason* for determining that termination would be detrimental.’ (§ 366.26, subd. (c)(1)(B), italics added.) A juvenile court finding that the relationship is a ‘compelling reason’ for finding detriment to the child is *based* on the facts but is not primarily a factual issue. It is, instead, a ‘quintessentially’ discretionary decision, which calls for the juvenile court to determine the *importance* of the relationship in terms of the detrimental impact that its severance can be expected to have on the child and to weigh that against the benefit to the child of adoption. [Citation.] Because this component of the juvenile court’s decision is discretionary, the abuse of discretion standard of review applies.” (*Bailey J., supra*, 189 Cal.App.4th at p. 1315; accord, *In re C.B.* (2010) 190 Cal.App.4th 102, 123 (*C.B.*.)

C. Regular Visitation and Contact

As noted above, one of the requirements of the beneficial parent-child relationship exception is that “[t]he parents have maintained regular visitation and contact with the child.” (§ 366.26, subd. (c)(1)(B)(i).) Below, the juvenile court found that the father had *not* maintained regular visitation and contact, based on the approximately three-month period between February of 2014 and May of 2014, during which the child had not visited the father, who was jail.

“Regular visitation exists where the parents visit consistently and to the extent permitted by court orders. [Citation.]” (*In re I.R.* (2014) 226 Cal.App.4th 201, 212.) Where there are “significant lapses in visits,” the juvenile court may properly find that a parent did not maintain regular visitation and contact. (*Ibid.*) Likewise, where a parent’s visitation is “sporadic,” the first prong of the beneficial parent-child relationship is not met. (*In re C.F.* (2011) 193 Cal.App.4th 549, 554.)

The father contends the juvenile court erred by finding he had not maintained regular visitation and contact because he “participated to the fullest extent possible in the visitation permitted by the juvenile court’s orders.” The record does not support this contention. Before the father began serving his sentence, the juvenile court had ordered the child to have visitation while the father was in custody “when appropriate and contact visits are allowed.” The father initially chose not to have the child visit him in jail, but after approximately three months, he changed his mind and contact visits with the child were instituted. The record thus indicates that the father’s lapse in visitation with the child was based on the father’s own decision not to have the child visit him in jail, not the juvenile court’s orders.

Other than that period of approximately three months, the father did regularly visit and contact the child throughout the second dependency proceedings, which lasted for two and a half years—from January of 2013, when the section 300 petition was filed, until the section 366.26 hearing in August of 2015. As explained in the next section,

however, even assuming that the juvenile court erred by finding that the father had not met his burden of showing that he had “maintained regular visitation and contact with the child” (§ 366.26, subd. (c)(1)(B)(i)), the error was harmless because substantial evidence supports the juvenile court’s finding that the father did not have a beneficial parental relationship with the child and the juvenile court did not abuse its discretion by finding that the relationship between the father and the child was so beneficial as to outweigh the benefits of adoption.

D. Beneficial Relationship

Under section 366.26, subdivision (c)(1)(B)(i), a parent must show that “the child would benefit from continuing the relationship.” As this court has explained, “the parent must show more than frequent and loving contact, an emotional bond with the child, or pleasant visits—the parent must show that he or she occupies a parental role in the life of the child. [Citation.]” (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1527 (*I.W.*).)

“ ‘The factors to be considered when looking for whether a relationship is important and beneficial are: (1) the age of the child, (2) the portion of the child’s life spent in the parent’s custody, (3) the positive or negative effect of interaction between the parent and the child, and (4) the child’s particular needs.’ [Citation.] ‘Interaction between natural parent and child will always confer some incidental benefit to the child. The significant attachment from child to parent results from the adult’s attention to the child’s needs for physical care, nourishment, comfort, affection and stimulation. [Citation.] The relationship arises from day-to-day interaction, companionship and shared experiences. [Citation.] The exception applies only where the court finds regular visits and contact have continued or developed a significant, positive, emotional attachment from child to parent.’ [Citation.] Evidence of ‘frequent and loving contact’ is not sufficient to establish the existence of a beneficial parental relationship. [Citation.]” (*Bailey J., supra*, 189 Cal.App.4th at pp. 1315-1316.) At the same time, however, the exception does not require “proof that the child has a ‘primary attachment’ to a parent or

that the noncustodial parent has maintained day-to-day contact with the child.

[Citations.]” (*In re S.B.* (2008) 164 Cal.App.4th 289, 300 (*S.B.*).)

At the time of the section 366.26 hearing in August of 2015, the child was nearly seven years old. The child had been in the father’s custody for about three years, from February of 2010, when she was a year old and the first dependency was terminated, until January of 2013, when she was four years old and the second dependency petition was filed. However, the child was not in his custody for about the same amount of time, including both the first year of her life and the two and a half years from the time the second dependency petition was filed in January of 2013 until the section 366.26 hearing in August of 2015.

Although the father maintained a relationship with the child during the time she was not in his custody, substantial evidence supports the juvenile court’s finding that by the time of the section 366.26 hearing, the nature of that relationship had changed to one in which the father no longer occupied a “parental role” in the child’s life that benefitted the child to such an extent that severing that relationship would greatly harm the child. (See *C.B.*, *supra*, 190 Cal.App.4th at p. 126.) The child’s relationship with the father consisted primarily of weekly telephone calls, and according to the social worker, the child enjoyed playing games with the father during the calls but did not “engage with him further.” The child referred to the paternal aunt as “mommy” and to her cousins as her brothers and sister. Although the child clearly loved the father and still called him “daddy,” she named her paternal aunt, uncle, and cousins as her family members. The child was thriving in the paternal aunt’s home and looked to the paternal aunt for support and reassurance, even when the father was present. On this record, we cannot say that the “ ‘undisputed facts lead to only one conclusion’ ” regarding the existence of a beneficial parental relationship, and thus the father’s substantial evidence challenge to the juvenile court’s determination “cannot succeed.” (*Bailey J.*, *supra*, 189 Cal.App.4th at p. 1314.)

Even assuming the juvenile court erred by finding that the father did not have a beneficial parental relationship with the child, the juvenile court did not abuse its discretion by finding that the existence of that relationship was not “a compelling reason for determining that termination would be detrimental to the child.” (§ 366.26, subd. (c)(1)(B)(i).)

The father contends this case is similar to *S.B.*, *supra*, 164 Cal.App.4th 289. In *S.B.*, the father contested the termination of his parental rights following the removal of the child due to both parents’ substance abuse. During the reunification period, the father visited the child three times per week, and the child became upset when her visits with the father ended. (*Id.* at p. 294.) The child stated that she wanted to live with the father, and the child told the father that she loved him and missed him. (*Id.* at p. 295.) During visits, the father had “ ‘demonstrate[d] empathy and the ability to put himself in his daughter’s place to recognize her needs.’ ” (*Id.* at p. 294.) A bonding study had been conducted, and the doctor concluded that “there was a potential for harm to S.B. were she to lose the parent-child relationship.” (*Id.* at p. 296.) The appellate court held that under the circumstances, the juvenile court had erred by finding that the beneficial parent-child relationship exception did not apply. “The record shows S.B. loved her father, wanted their relationship to continue and derived some measure of benefit from his visits. Based on this record, the only reasonable inference is that S.B. would be greatly harmed by the loss of her significant, positive relationship with [her father]. [Citation.]” (*Id.* at pp. 300-301.)

“The *S.B.* case has been criticized by other appellate courts for its suggestion the exception applies if the child merely ‘derived some measure of benefit’ from the parental relationship. (*S.B.*, *supra*, 164 Cal.App.4th at p. 301.) The same appellate court that authored the *S.B.* case cautioned in *In re Jason J.* (2009) 175 Cal.App.4th 922, 937: ‘The *S.B.* opinion must be viewed in light of its particular facts. It does not, of course, stand for the proposition that a termination order is subject to reversal whenever there is “some

measure of benefit” in continued contact between parent and child.’ More recently, the same court emphasized in *In re C.F.* (2011) 193 Cal.App.4th 549, 558-559 that the *S.B.* case must be ‘confined to its extraordinary facts. [The *S.B.* case] does not support the proposition a parent may establish the parent-child beneficial relationship exception by merely showing the child derives some measure of benefit from maintaining parental contact.’ ” (*In re J.C.* (2014) 226 Cal.App.4th 503, 530.)

The instant case does share some factors with *S.B.*, but there are also some significant differences. As in *S.B.*, the child stated that she missed the father and had expressed a desire to live with him. However, the child also expressed a desire for her paternal aunt’s home to be her “ ‘forever’ home.” This case is also different from *S.B.* in that there was no bonding study and no expert testimony that the child would be detrimentally affected by the loss of her relationship with her father. In fact, the social workers in this case testified that they did not think the child would suffer detriment if the father’s parental rights were terminated. The social workers and the child’s therapist all agreed that the child *would* suffer detriment if she was removed from the *paternal aunt’s* home. The evidence showed that the child was “ ‘connected and bonded’ to her aunt,” that she identified her prospective adoptive family as her family, and that the paternal aunt’s home was a “stable home environment” that benefitted the child, who needed stability after being moved from placement to placement. Further, in contrast to *S.B.*, where the father had “ ‘demonstrate[d] empathy and the ability to put himself in his daughter’s place to recognize her needs’ ” (*S.B.*, *supra*, 164 Cal.App.4th at p. 294), the social worker in this case opined that the father was “putting his needs first” when, for example, he would not let the child end a phone call early. And finally, the instant case is different from *S.B.* because of the likelihood the child would not have been able to stay in her placement with the paternal aunt in Canada without being freed for adoption, since she would not have been eligible for state-funded health care. A permanent plan of guardianship would not have allowed the child to remain in the paternal aunt’s home yet

maintain her relationship with the father. (Compare *In re Jerome D.* (2000) 84 Cal.App.4th 1200, 1208.)

The father also asserts that in this case, as in *S.B.*, the juvenile court injected an improper factor into the weighing process, namely, the paternal aunt's apparent willingness to allow the child to have continued contact with the father. (See *S.B.*, *supra*, 164 Cal.App.4th at p. 300 ["We do not believe a parent should be deprived of a legal relationship with his or her child on the basis of an unenforceable promise of future visitation by the child's prospective adoptive parents."].) As this court has explained, " 'In dependency proceedings, an order terminating parental rights is not only conclusive and binding upon the birth parents, but also effectuates a complete and final legal termination of the parental relationship. [Citations.] The parent-child relationship enjoys no legal recognition after termination of parental rights. [Citation.]' [Citation.]" (*C.B.*, *supra*, 190 Cal.App.4th at p. 128.)

Unlike in *S.B.*, where the juvenile court had "based its decision to terminate parental rights in part on the grandparents' willingness to allow [the father] to continue to visit S.B." (*S.B.*, *supra*, 164 Cal.App.4th at p. 300), here the juvenile court did not base its decision on the paternal aunt's support for ongoing contact between the father and the child. The juvenile court in this case explicitly weighed the strength and nature of the father's bond with the child against the benefits of adoption. The juvenile court acknowledged that the father was important to the child but found that the child's need for stability and permanence was "paramount" in light of her history of having multiple caregivers and placements during the two dependency proceedings. The juvenile court found that even if the child "never sees her father again," the detriment from termination of his parental rights was not as great as the detriment she would suffer if she was not adopted. Only after making that finding did the juvenile court comment that it was "unlikely" the child would have no further contact with the father due to the fact that the paternal aunt supported ongoing contact.

We recognize, as the juvenile court found, that the father loves the child, that he had maintained hope of reunifying throughout the proceedings, and that he had a “strong wish to have [the child] back with him.” While we commend the father’s efforts and progress, the evidence presented at the section 366.26 hearing did not compel a finding that the relationship between the father and the child was so beneficial as to outweigh the benefits of adoption. (See *In re Autumn H.* (1994) 27 Cal.App.4th 567, 575; *I.W.*, *supra*, 180 Cal.App.4th at p. 1528.) On this record, the juvenile court did not err by finding that the father failed to meet his burden of proof as to the parent-child exception. The juvenile court reasonably determined that this was not the “extraordinary case” in which “preservation of the parent’s rights will prevail over the Legislature’s preference for adoptive placement.” (*Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1350.)

IV. DISPOSITION

The juvenile court’s August 28, 2015 orders are affirmed.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

ELIA, ACTING P.J.

MIHARA, J.

In re M.C.; DFCS v. J.C.
H042751